

E-Filed 7/19/2011

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

KAREN JO MURPHY

Plaintiff,

V.

WELLS FARGO BANK, N.A.; WACHOVIA MORTGAGE, a division of WELLS FARGO BANK, N.A., formerly known as WACHOVIA MORTGAGE, FSB, formerly known as WORLD SAVINGS BANK, FSB; and DOES 1-50, inclusive

Defendants.

Case Number 5:10-cv-05837-JF (PSG)

ORDER¹ GRANTING MOTION TO
DISMISS FIRST AMENDED
COMPLAINT WITH LEAVE TO
AMEND IN PART

[Re: Docket No. 32]

Plaintiff Karen Jo Murphy (“Murphy”) alleges that Defendants Wells Fargo Bank, N.A., *et al.* (“Wells Fargo”) conducted an illegal non-judicial foreclosure of her residences located at 945 14th Street, Pacific Grove, California and 1475 Inglewood Ave., St. Helena, California (“the Properties”). Wells Fargo denies this claim and moves to dismiss the First Amended Complaint (“FAC”)² pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the motion will

¹ This disposition is not designated for publication in the official reports.

² On March 29, 2011, the Court dismissed the original complaint with leave to amend in order to allow Murphy to re-plead her claims with the assistance of newly-obtained counsel. Order Granting Motion to Dismiss With Leave to Amend Dkt. 24.

1 be granted, with leave to amend in part.

2 **I. BACKGROUND**

3 **A. The St. Helena Property**

4 On December 12, 2007, Murphy obtained a loan from Wells Fargo in the amount of \$2.2
 5 million, which was secured by the St. Helena Property and evidenced by a note. *See* Defendants'
 6 Request for Judicial Notice ("RJN") Exs. L, M at Dkt. 33.³ Subsequently, Murphy defaulted on
 7 the loan, and a notice of default was recorded with the Napa County recorder by NDEX West,
 8 LLC, acting as the agent for Wells Fargo. *Id.* at Ex. N. The Property was sold to a third party at
 9 a trustee's sale on July 30, 2010. *Id.* at Ex. O.

10 **B. The Pacific Grove Property**

11 On December 8, 2006, the parties entered into a loan agreement in connection with the
 12 Pacific Grove Property. *Id.* at Exs. F, G. As with the St. Helena Property, the loan was
 13 evidenced by a note and secured by a deed of trust. *Id.* Murphy later defaulted on the loan, a
 14 notice of default was recorded with the Monterey County Recorder by Cal-Western
 15 Reconveyance Corporation acting as the agent for Wells Fargo, and a trustee's sale was
 16 conducted on August 8, 2010. *Id.* at Exs. H, I. In September 2010, Wells Fargo initiated an
 17 unlawful detainer action in an effort to evict Murphy from the Property. *Id.* at Ex. J. One month
 18 later, the Monterey Superior Court entered a default judgment in favor of Wells Fargo. *Id.* at Ex.
 19 K.

20 **C. Causes of Action**

21 Murphy asserts that at sometime prior to June 2009, Wells Fargo sold the subject notes
 22 and deeds of trust to various investors. FAC at 2. She alleges that as a result, Wells Fargo no
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 25 ³ Pursuant to Fed. R. Evid. 201(b), "A judicially noticed fact must be one not subject to
 26 reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the
 27 trial court or (2) capable of accurate and ready determination by resort to sources whose
 28 accuracy cannot reasonably be questioned." When ruling on a motion to dismiss, the Court
 properly may consider "a document the authenticity of which is not contested, and upon which
 the plaintiff's complaint necessarily relies." *Parrino v. FHP, Inc.*, 146 F.3d 699, 706 (9th Cir.
 1998).

1 longer retained an interest in the Properties and had no legal basis to undertake foreclosure
 2 proceedings. *Id.* at 2-3. She seeks to quiet title and recover damages for trespass.

3 II. LEGAL STANDARD

4 “Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a
 5 cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v.*
 6 *Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008). For purposes of a motion to
 7 dismiss, the plaintiff’s allegations are taken as true, and the court must construe the complaint in
 8 the light most favorable to the plaintiff. *Jenkins v. McKeithen*, 395 U.S. 411, 421, 89 S.Ct. 1843,
 9 23 L.Ed.2d 404 (1969). “To survive a motion to dismiss, a complaint must contain sufficient
 10 factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ A claim
 11 has facial plausibility when the plaintiff pleads factual content that allows the court to draw the
 12 reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*,
 13 129 S.Ct. 1937, 1949, 173 L.Ed.2d 868 (2009), *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556,
 14 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Thus, a court need not accept as true conclusory
 15 allegations, unreasonable inferences, legal characterizations, or unwarranted deductions of fact
 16 contained in the complaint. *Clegg v. Cult Awareness Network*, 18 F.3d 752, 754-755 (9th
 17 Cir.1994). Leave to amend must be granted unless it is clear that the complaint’s deficiencies
 18 cannot be cured by amendment. *Lucas v. Dep’t of Corr.*, 66 F.3d 245, 248 (9th Cir.1995). When
 19 amendment would be futile, however, dismissal may be ordered with prejudice. *Dumas v. Kipp*,
 20 90 F.3d 386, 393 (9th Cir.1996).

21 II. DISCUSSION

22 A. Quiet Title

23 California law requires that an action to quiet title include: (1) a description of the
 24 property in question; (2) the basis for plaintiff’s title; and (3) the adverse claims to plaintiff’s
 25 title. Cal. Code Civ. Proc. § 761.020; *Kelley v. Mortgage Electronic Registration Systems, Inc.*,
 26 642 F.Supp.2d 1048, 1057 (N.D. Cal. 2009). However, “[u]nder California law, a borrower may
 27 not quiet title without first paying the outstanding debt on the property.” *Roberts v. JP Morgan*

1 *Chase Bank, N.A.*, Nos. 09-CV-01855-LHK, 09-CV-01879, 2011 WL 864949, at *7 (N.D. Cal.
 2 Mar. 11, 2011) (citing *Miller v. Provost*, 26 Cal.App.4th 1703, 1707 (1994) (“a mortgagor of real
 3 property cannot, without paying his debt, quiet his title against the mortgagee”)). Here, Murphy
 4 does not allege that she has tendered the outstanding debt or has the ability to do so.

5 Moreover, Murphy’s action to quiet title is premised upon the theory that Wells Fargo
 6 had no beneficial interest in the Properties at the time of foreclosure. However, the judicially-
 7 noticed facts outlined above contradict this allegation. World Savings Bank, FSB, and its
 8 successors and/or assigns are identified as the “lender” and “beneficiary” in both deeds of trust.
 9 RJD Exs. F, L. Wells Fargo is a successor to World Savings Bank, FSB, and thus is a
 10 beneficiary.⁴ It is clear from the notices of default that Cal-Western Reconveyance and NDEX
 11 West were acting on behalf of Wells Fargo through Wells Fargo’s predecessor World Savings
 12 Bank.⁵ Nothing in the FAC establishes that Wells Fargo as the legal beneficiary lacked authority
 13 to commence foreclosure proceedings through its agents Cal-Western Reconveyance and NDEX
 14 West. *Cf. Gomes v. Countrywide Home Loans, Inc.*, No. D057005, 2011 WL 566737, at *5 (Cal.
 15 App. 4 Dist. Feb. 18, 2011) (“MERS is the owner and holder of the note as nominee for the
 16 lender, and thus MERS can enforce the note on the lender’s behalf.”) (citation omitted). Instead,
 17 Murphy’s argument is contradicted by the deeds of trust, which grant the express power of sale
 18 to the beneficiary in the event of default, stating that the beneficiary may “take action to have the
 19 Property sold under applicable law. . . .” RJD Exs. F, L.

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 21 ⁴ In November 2009, Wachovia Mortgage, FSB—a successor of World Savings Bank,
 22 FSB—became a division of Wells Fargo. RJD Ex. D.

23 ⁵ The Napa County Notice of Default states, “NDEX West, LLC is the original Trustee,
 24 duly appointed Substituted Trustee, or acting as Agent for the Trustee or Beneficiary under a
 25 Deed of Trust dated 12/12/2007, executed by Karen Jo Murphy, as Trustor, to secure obligations
 26 in favor of World Savings Bank, FSB, as Beneficiary . . .” RJD Ex. N. The Monterey County
 27 Notice of Default states, “Cal-Western Reconveyance Corporation is either the original trustee,
 28 the duly appointed substituted trustee, or acting as agent for the trustee or beneficiary under a
 deed of trust dated December 8, 2006 executed by Karen J Murphy an unmarried woman as
 trustor, to secure obligations in favor of World Savings Bank, FSB, its Successors and/or
 Assignees as beneficiary . . .” RJD Ex. H.

1 A recent decision from the California Court of Appeal has addressed this very issue and
 2 in turn has solidified the so-called “tender rule” even further, holding that a beneficiary is
 3 authorized “to initiate foreclosure proceedings and invoke the tender rule against a defaulting
 4 borrower, even when the beneficiary is not the holder of the original promissory note.”

5 *Ferguson v. Avelo Mortgage, LLC*, No. B223447, 2011 WL 2139143, at *5 (Cal.App.2 Dist.
 6 June 1, 2011) (citations omitted). *Ferguson* made clear that “California law ‘does not require
 7 possession of the note as a precondition to [nonjudicial] foreclosure under a Deed of Trust.’” *Id.*
 8 (citing *Jensen v. Quality Loan Service Corp.*, 702 F. Supp. 2d 1183, 1189 (E.D. Cal.2010);
 9 *Odinma v. Aurora Loan Services*, No. C-09-4674 EDL, 2010 WL 1199886, at *4 (N.D. Cal.
 10 Mar. 23, 2010); *Morgera v. Countrywide Home Loans, Inc.*, No. 2:09-cv-01476-MCE-GGH,
 11 2010 WL 160348, at *8 (E.D. Cal. Jan. 11, 2010).); *See also Gandrup v. GMAC Mortg.*, No.
 12 11-CV-0659-LHK, 2011 WL 703753, at *2 (N.D. Cal. Feb. 18, 2011) (“[U]nder California law,
 13 there is no requirement that the trustee have possession of the physical note before initiating
 14 foreclosure proceedings.”).

15 **B. Trespass**

16 Murphy bases her trespass claim upon the same holder-in-due course theory that she
 17 offers with respect to her claim to quiet title. Accordingly, this claim also is subject to dismissal.

18 **C. Collateral Estoppel**

19 With respect to the Pacific Grove Property, collateral estoppel bars Murphy from re-
 20 adjudicating the foreclosure. In determining the collateral estoppel effect of a state court
 21 judgment, federal courts must, as a matter of full faith and credit, apply that state’s law of
 22 collateral estoppel. *In re Bugna*, 33 F.3d 1054, 1057 (9th Cir. 1994). Under California law,
 23 collateral estoppel bars re-litigation when (1) the issue decided in the prior action is identical to
 24 the issue presented in the second action; (2) there was a final judgment on the merits; and (3) the
 25 party against whom estoppel is asserted was a party to the prior adjudication. *Id.*

26 Defendants point out correctly that “[A] default judgment conclusively establishes,
 27 between the parties so far as subsequent proceedings on a different cause of action are

1 concerned, the truth of all material allegations contained in the complaint in the first action, and
 2 every fact necessary to uphold the default judgment . . .” *Mitchell v. Jones*, 172 Cal.App.2d 580,
 3 586-87 (1959); *see also Four Star Electric, Inv. v. F&H Constr.*, 7 Cal.App.4th 1375, 1380
 4 (1992). As such, the default judgment entered against Murphy in the September 2010 unlawful
 5 detainer action necessarily indicates that the foreclosure was conducted in accordance with
 6 California’s non-judicial foreclosure requirements, as Wells Fargo alleged this fact in its
 7 complaint. RJN Ex. J ¶ 5.

8 Murphy argues that the default judgment is irrelevant because her holder-in-due course
 9 theory was not actually litigated in the unlawful detainer action. However, for the purpose of
 10 collateral estoppel, “[a]n issue is actually litigated [w]hen [it] is properly raised, by the pleadings
 11 or otherwise, and is submitted for determination, and is determined....” *Gottlieb v. Kest*, 141
 12 Cal.App.4th 110, 148 (2006) (citation omitted). “[C]ollateral estoppel operates ... to obviate the
 13 need to relitigate issues already adjudicated in the first action.” *Id.* (citation omitted). To the
 14 extent that Murphy seeks relief from the state court judgment, this Court is an improper forum.

15 **III. ORDER**

16 Good cause therefor appearing, the motion is GRANTED, with leave to amend as to the
 17 claims regarding the St. Helena property. Murphy’s claims with respect to the Pacific Grove
 18 Property are hereby DISMISSED WITHOUT LEAVE TO AMEND. Any amended pleading
 19 shall be filed within twenty (20) days of the date of this order.

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 21 **IT IS SO ORDERED.**

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 23 DATED: July 19, 2011



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JEREMY FOGEL
 United States District Judge